2-454

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~340~~ 56

WILLIAM H. ROBERTSON, COLLECTOR OF THE PORT OF NEW YORK, PLAINTIFF IN ERROR,

vs.

OTTO GERDAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED AUGUST 19, 1886.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Otto Gerdan, plaintiff, and William H. Robertson, defendant, a manifest error hath happened to the great damage of the said William H. Robertson, as by his complaint appear. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-six, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, chief justice of the said Supreme Court, the 20th day of May, in the year of our Lord one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH,
Clk.

The foregoing writ is hereby allowed.
[SEAL.] ADDISON BROWN.

2 (Indorsed:) 9623. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Otto Gerdan, defendant in error. Writ of error. Stephen A. Walker, attorney for plaintiff in error. Due service of copy of the within is hereby admitted, this 20th day of May, 1886. Chas. Curie, atty. for deft. in error.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

3 I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from four to thirty-four, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of William H. Robertson, plaintiff in error, against Otto Gerdan, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this seventeenth day of August, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[SEAL.] TIMOTHY GRIFFITH,
Clk.

4 *Summons.*

Superior court of the city of New York.

OTTO GERDAN, PLAINTIFF,
against
WILLIAM H. ROBERTSON, DEFENDANT. } No. 1.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, M'ch 16, 1885.

CHAS. CURIE,
Plaintiff's Attorney,
Office, No. 44 Exchange Place, New York City.

5 (Indorsed:) No. 1—N. Y. superior court. Otto Gerdan, plaintiff, against William H. Robertson, defendant. Summons. Chas. Curie, plaintiff's attorney, 44 Exchange Place, New York City. Due service hereof admitted, this 16' day of M'ch, 1885.

6 *Notice of appearance and demand.*

N. Y. superior court.

OTTO GERDAN
versus
WILLIAM H. ROBERTSON.

You will please take notice that I am retained by and appear as attorney for the defendant in this action, and demand service of a bill of particulars of the plaintiff's claim herein, and a copy of the complaint and all papers in this action, upon me, at my office in the United States court and post-office building, in the city of New York.

Yours,
ELIHU ROOT,
United States Att'y, Att'y for Defendant.

To C. CURIE, Esq., *Att'y for Plaintiff.*

NEW YORK, *March* 19, 1885.

7 (Indorsed:) 9623. N. Y. superior court. Otto Gerdan versus William H. Robertson. Notice of appearance. Elihu Root, U. S. attorney, att'y for def't. To C. Curie, esq., plaintiff's att'y.

8 *Certiorari.*

The President of the United States of America to the judges of the superior court of the city of New York, greeting:

[L. S.] We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against William H. Robertson, defendant,

by Otto Gerdan, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 31st day of March, 1885, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Morrison R. Waite, esquire, Chief Justice of the Supreme Court of the United States, the 25th day of March, in the year one thousand eight hundred and eighty-five.

TIMOTHY GRIFFITH, *Clerk.*

ELIHU ROOT,
United States Attorney, Attorney for Defendant.

9 (Indorsed:) 9623. U. S. circuit court. Otto Gerdan vs. William H. Robertson. Copy certiorari. Elihu Root, U. S. attorney, attorney for defendant.

Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the Southern district of New York. New York, Ma'h 25, 1885. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To C. Curie, e'q., plaintiff's attorney.

10 *Complaint.*

Circuit court of the United States for the southern district of New York.

OTTO GERDAN, PLAINTIFF,
against
WILLIAM H. ROBERTSON, DEFENDANT.

Plaintiff complains:

1st. That defendant was, during the time hereinafter named, collector of customs of the United States, at the port of New York.

2d. That plaintiff was, during said times, in trade under the name of Otto Gerdan, and, as such, duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiff as and for duties thereon, and plaintiffs, in order to obtain said goods, was compelled to pay, and did pay the sum of eleven hundred & eighty $\frac{50}{100}$ dollars in excess of the amount required by law.

4th. That plaintiff filed with said defendant due and timely protests, in writing, upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

5th. That plaintiff made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals, when this action was commenced.

6th. That the bill of particulars, hereto annexed, states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of

the Treasury, and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. The said sum, so exacted as aforesaid, has never been repaid to plaintiffs, and is still due and owing to him.

Wherefore, plaintiffs demand judgment against defendant for eleven hundred and eighty $\frac{50}{100}$ dollars, with interest on the several sums named in the bill of particulars, from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiffs.

11 (Indorsed:) 9623. U. S. circuit court. Otto Gerdan, plaintiff, against William H. Robertson, defendant. Complaint. Chas. Currie, plaintiff's attorney, 44 Exchange Place, New York City.

Due service of a copy hereof admitted, this 13 day of Ap'l, 1885.

ELIHU ROOT,
U. S. Att'y, Att'y for Dft.

12 *Bill of particulars.*

Name of importer, ——— ———.

Ivory keys for pianos and organs.

Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.
		1882.	1882.		1882.	1882.	1882.	1884.
Hamburg ..	Bohemia.....	Aug. 25	Sept. 12	$614.25	Sept. 12	Nov. 11	Nov. 11	Dec. 31
Do.....	Silesia.....	Sept. 22	Oct. 9	325.30	Oct. 9	Dec. 21	Dec. 21	" 31
		1883.	'84.		1884.	1884.	1884.	
Do.....	Frisia.....	Dec 21	Jan. 14	62.95	Ja'y 15	Ja'y 23	Jan'y 23	(*)
		1884.						
Do.....	Hammonia.....	Oct. 15	Nov. 3	103.20	Nov. 3	Nov. 26	Nov. 26	(*)
Do.....	Silesia.....	Sept. 22	Oct. 10	74.80	Oct. 11	" 26	" 26	(*)

* No ans. rec'd.

13 (Indorsed:) 9623. U. S. circuit court, southern district of New York. Otto Gerdan against William H. Robertson. Bill of particulars.

NEW YORK, *Apl. 13th*, 1885.

To ELIHU ROOT, Esquire,
Defendant's Attorney.

SIR: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiff's bill of particulars.

CHAS. CURIE,
Plaintiff's Attorney,
44 Exchange Place, New York City.

Due service hereof admitted this 13th day of Ap'l, 1885.

ELIHU ROOT,
U. S. Att'y, Defendant's Attorney.

14 *Answer.*

Circuit court of the United States for the southern district of New York.

OTTO GERDAN
versus
WILLIAM H. ROBERTSON, COLLECTOR, ETC. } 9623.

The defendant answers to the complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint; and he denies that the plaintiff was compelled to pay or did pay defendant as collector or otherwise the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiff filed with defendant any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiff.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned were in fact such goods as are described in the said complaint.

15 V. And further answering, defendant alleges that all moneys received by him from the plaintiff in respect of the importations in the complaint alleged to have been made were demanded of plaintiff and were by plaintiff voluntarily paid to him in his capacity as collector of customs, as and for duties due the United States on imported merchandise and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiff, paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

VI. And further answering, defendant alleges that all moneys received by him from the plaintiff in respect of the importations in the complaint alleged to have been made, were sums due from plaintiff to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiff and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's entry thereof were collected or received by defendant from the plaintiff.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

WILLIAM DORSHEIMER,
United States Attorney, Attorney for the Defendant.

(Indorsed:) Copy. 9623. U. S. circuit court, southern district of New York. Otto Gerdan vs. W. H. Robertson, collector, etc. Answer. William Dorsheimer, United States attorney, attorney for defendant.

Due service of a copy of the within answer is hereby admitted. New York, Sept. 23d, 1888. Chas. Curie, plaintiff's attorney.

16 *Minutes of trial.*

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms, in the city of New York, on Thursday the 17th day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Hoyt H. Wheeler, sitting as circuit judge.

OTTO GERDAN
vs.
W. H. ROBERTSON. } 9623.

Now comes the plaintiff by Stanley Clarke & Smith, esqs., his attorneys, and moves the trial of this cause; likewise comes the defendant by John P. Clark, esq., ass't U. S. att'y, his attorney. Thereupon a jury is empanelled and the cause proceeds to trial.

Counsel for the respective parties herein stipulate in open court that if the verdict be for the plaintiff it shall be for the plaintiff generally, subject to adjustment at the custom-house under the direction of the court.

After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, the jury retire, and on their return
17 render a verdict whereby they find for the plaintiff generally.

It is ordered that a certificate of probable cause be entered herein, and that the defendant have a stay of proceedings herein for thirty days.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

18 *Certificate of adjustment.*

United States circuit court for the southern district of New York.

N. S. 9623.] [CUSTOM-HOUSE,
Collector's Office, May 10, 1886.

OTTO GERDAN
vs.
WILLIAM H. ROBERTSON. } Verdict dated.

SIR: The adjustment in the above case is as follows:

Amount overpaid	$264.10
Interest added to May 10, 1886	34.55
	298.65

Respectfully,
C. T. E. L. HEDDEN,
Collector.

To the UNITED STATES DISTRICT ATTORNEY for the southern district of New York.

(Endorsed:) 9623. No. 93. Collector, &c., for the district
19 of New York reports adjustment of case of Gerdan vs. Robertson.

20 *Judgment.*

U. S. circuit court, southern district of New York.

OTTO GERDAN
vs.
WILLIAM H. ROBERTSON. } No. 9623.

The above-entitled cause having been brought on for trial on the 17th day of December, 1885, before the Honorable Hoyt H. Wheeler, sitting as a judge of this court, and a jury, and a verdict having thereafter been found for the plaintiff generally, subject to adjustment at the custom-house, and the amount for which plaintiff was entitled to a verdict having been thereafter adjusted, as appears by the certificate of the collector of customs hereto annexed, and the costs having thereafter been duly taxed;

Now, upon motion of Charles Curie, esq., attorney for plaintiff, it is ordered and adjudged that the plaintiff, Otto Gerdan, recover of William H. Robertson, the defendant herein, the sum of two hundred and sixty-four

21 dollars and ten cents ($264.10) damages, thirty-four dollars and fifty-five cents ($34.55) interest, and forty-six dollars and eighty-five cents ($46.85) costs, making in all the sum of three hundred and forty-five dollars and fifty cents ($345.50), and have execution therefor.

264.10
34.55
46.85
$345.50

Judgment signed this 17th day of May, 1886.

JOHN A. SHIELDS,
Deputy Clerk.

(Endorsed:) U. S. circuit court. Otto Gerdan vs. Wm. H. Robertson. Judgm't roll. Charles Curie, esq., att'y for pl'ff, 44 Exchange Place, N. Y. City. U. S. circuit court. Filed May 17, 1886. Timothy Griffith, clerk.

22 *Bill of exceptions.*

Circuit court of the United States for the southern district of New York.

OTTO GERDAN
vs.
WILLIAM H. ROBERTSON. } N. S. 9623.

And afterwards, to wit, on the 17th day of December, 1885, this case came on to be tried before the Hon. Hoyt H. Wheeler, district judge of the United States for the district of Vermont, duly assigned to hold this court, and a jury duly empanelled and sworn to try the issues herein.

The parties appeared by their counsel, Charles Curie and Stephen G. Clarke, for the plaintiffs; John Proctor Clarke, for the defendant.

The plaintiff, by his counsel, having opened his case to the jury, offered evidence which was admitted to show that in the months of September and October, 1882, the plaintiff imported certain ivory pieces for the keys

of pianos or organs into the United States at the port of New York,
23 which were duly entered at said port on September 11, 1882, and October 9, 1882, and also imported the same or similar articles in the year 1884, which were duly entered at said port on January 14, October 10, and November 3, 1884. That the defendant, as collector of the port of New York, levied customs duties upon said goods, imported as aforesaid in 1882, under Schedule M of the tariff act of June 22nd, 1874, as a manufacture of ivory, at thirty-five per centum ad valorem, and also levied customs duties upon said goods imported as aforesaid in 1884, under Schedule N of the tariff act of March 3, 1883, as a manufacture of ivory, not specially enumerated or provided for, at thirty per centum ad valorem. The plaintiff duly protested and appealed from such decision of the defendant to the Secretary of the Treasury, claiming that said goods imported in 1882 were dutiable at thirty per centum ad valorem under Schedule M of the tariff act of June 22nd, 1874, as musical instruments, and that the said goods imported in 1884 were dutiable at twenty-five per centum ad valorem, under Schedule N of the tariff act of March 3rd, 1883,
24 as musical instruments. That the Secretary of the Treasury affirmed the said decision of defendant. Suit was brought in due time.

Plaintiff called as his only witness George W. Clark, who, being duly sworn, testified that he was in the employ of plaintiff; that he identified the samples produced as similar to the articles which were imported; that they are pieces for the keys of pianos or organs; that they come in packages and are matched to certain octaves for certain instruments, to wit, organs and pianos, five octaves for organs and seven octaves for pianos, and are glued on the keys; that they are sawed and cut in a particular shape for that purpose, and are tapered in thickness, so that the end meets and the shaft comes in between.

Q. They are used for no other purpose than for pianos and organ keys?—A. That is it, sir.

On cross-examination this witness testified that he had never put them on pianos or organs; that there are different grades and two sizes of the articles in question.

25 Q. Do you know how they are put on the piano?—A. We don't do that; we sell to the piano makers and key-board makers. I have seen it done. They scrape them to make them hold to the wood; then they are put on the key-board, and then sawed out and stuck on in that way on a large board, and then sawed out, and this, the ivory piece, is then glued on top of it, and then it is polished.

Q. Are the corners rounded off?—A. We don't do that; we sell to the makers.

Q. As a matter of fact, don't you know that the outside corners are rounded off?—A. I have seen it so, yes sir; on the pianos. We are not piano makers; we sell to the piano and key-board makers.

Defendant's counsel then moved for a direction of a verdict in favor of the defendant on two grounds, viz:

1st. That the imported article was not a musical instrument.

2nd. That it was not a completed indispensable part of a musical instrument.

The motion was denied by the court, to which defendant's counsel excepted. No other evidence was offered on either side.

26 Whereupon the court charged the jury as follows: You see what the imported articles are and have heard what has been said about them; they are sawed out, tapering and notched; then they go on a board, and the board is sawed out so as to leave the keys, as I understand it. And if you think they are used exclusively for musical instruments, that is, for pianos and organs, you will return a verdict for the plaintiff; if not, for the defendant.

Counsel for the defendant then asked the court to charge that, in order to find for the plaintiffs, they must find that the imported articles are completed indispensable parts of a musical instrument.

The COURT. I will leave out the word "completed;" I put it in just that way, that is they must be used exclusively for that use and for no other purpose.

To which counsel for defendant excepted.

The COURT. If they are made on purpose for pianos and organs as musical instruments, and no other purpose, then you may return a verdict for the plaintiff; if they are for any other purpose, return a verdict for the defendant.

Counsel for the defendant then excepted to that portion of the
27 charge of the court stated as follows:

"If they are made on purpose for pianos and organs as musical instruments and no other purpose, then you may return a verdict for the plaintiff."

Thereupon the jury returned a verdict for the plaintiff.

And forasmuch as the exception matters and things aforesaid would not otherwise appear by the record, on the prayer of the said defendant by his counsel, I have settled, allowed, and signed this bill of exceptions, and

It is ordered that the same be filed as a part of the record herein with like force and effect as if the same had been reduced to writing, signed, and filed before the cause was given to the jury.

Witness my hand this 6th day of March, 1886.

HOYT H. WHEELER.

28 (Endorsed:) 9623. U. S. circuit court southern district of New York. Otto Gerdan versus Wm. H. Robertson. Bill of exceptions. William Dorsheimer, United States attorney, attorney for defend.

Due service of a copy of the within is hereby admitted.

New York ——— 188 , , *Att'y for Pl'ff.*

To *Att'y for Pl'ff.*

U. S. circuit court.

Filed March 8, 1886. Timothy Griffith, clerk.

29 *Assignment of Errors.*

Supreme Court of the United States.

WILLIAM H. ROBERTSON, PLAINTIFF IN ERROR,
v.
OTTO GERDAN, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October in the same term before the justices of the said court at the Capitol in Washington, comes

the said plaintiff in error, Stephen A. Walker(his) attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error, whereas, by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant.

And the said plaintiff pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he, the said plaintiff, may be restored to all things which he has lost by occasion of said judgment, &c.

STEPHEN A. WALKER,
Attorney for Pl'ff in Error.

30 (Indorsed:) 9623. United States Supreme Court. William H. Robertson, plaintiff in error, vs. Otto Gerdan, defendant in error. Assignment of error. Stephen A. Walker, att'y for plaintiff in error.

Due service of a copy of the within is hereby admitted this 20th day of May, 1886.

CHAS. CURIE,
Att'y for D'f't in Error.

U. S. circuit court. Filed May 20, 1886.

Joinder in error.

31 U. S. Supreme Court.

WILLIAM H. ROBERTSON, PLAINTIFF IN ERROR,
vs.
OTTO GERDAN, DEFENDANT IN ERROR.

And afterwards, to wit, on the 2nd Monday of October term, 1886, the said defendant in error, by Charles Curie, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the records and proceedings aforesaid as the matter aforesaid above assigned for error, and that
32 the judgment aforesaid, in form aforesaid, given may be in all things affirmed, etc.

CHARLES CURIE,
Attorney for Defendant in Error.

(Endorsed:) U. S. Supreme Court. William H. Robertson, pl'ff in error, vs. Otto Gerdan, def't in error. Joinder in error. Charles Curie, esq., attorney for def't in error, 44 Exchange Place, N. Y. City. Due service of a copy of the within is hereby admitted. N. Y., June 9th, 1886. Stephen A. Walker, attorney for pl'ff in error. U. S. circuit court. Jan. 9, 1886. Timothy Griffith, clerk.

33 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Otto Gerdan, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southeren district of New York, wherein William H. Robertson is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated May 20th, 1886.

ADDISON BROWN.

34 (Indorsed:) 9623. U. S. Supreme Court. William H. Robertson, plaintiff in error, against Otto Gerdan, defendant in error. Citation. Stephen A. Walker, attorney for plaintiff in error.

Due service of a copy of the within is hereby admitted this 20 day of May, 1886.

CHAS. CURIE,
Att'y for Def't in Error.

35 (Indorsement on cover:) No. 319. William H. Robertson, collector of the port of New York, plaintiff in error, vs. Otto Gerdan. S. New York, C. C. U. S. Filed August 19, 1886.

Supreme Court, U.S.
FILED.
OCT 28 1889
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

WILLIAM H. ROBERTSON, COLLECTOR, etc., plaintiff in error,
vs.
OTTO GERDAN.
No. 56.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

WM. A. MAURY,
Assistant Attorney-General.

BRIEF FOR THE PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

WILLIAM H. ROBERTSON, COLLECTOR, etc., plaintiff in error,
vs.
OTTO GERDAN. } No. 56.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

This is an action brought by the defendant in error against the plaintiff in error to recover back the amount of an alleged excessive exaction of duties made by him as collector of the port of New York, on certain importations of ivory pieces for the keys of pianos and organs. A part of these importations was made on Septem-

ber 11 and October 9, 1882, and the residue on January 14, October 10, and November 3, 1884.

The importations of 1882 were held dutiable at 35 per cent. ad valorem, as a manufacture of ivory under schedule M of the tariff act of June 22, 1874, and the importations of 1884 were held dutiable at 30 per cent. ad valorem, as a manufacture of ivory, not specially enumerated or provided for, under schedule N of the tariff act of March 3, 1883 (Rec., pp. 7-8).

The defendant in error claimed that the goods imported in 1882 were dutiable at 30 per cent. ad valorem under said schedule M of the act of 1874, and that the goods imported in 1884 were dutiable at 25 per cent. ad valorem under schedule N of the act of 1883 (Rec., p. 8).

But the ruling of the collector was affirmed on appeal to the Secretary of the Treasury (Rec., p. 8). Hence this suit.

The bill of exceptions shows that the plaintiff examined a witness who identified the samples shown him as identical with the articles imported, which he said were pieces for the keys of pianos or organs; that they came in packages, and are

matched to certain octaves for organs and pianos and are glued on the keys; "that they are sawed and cut in a particular shape for that purpose, and are tapered in thickness so that the end meets and the shaft comes in between," and are used for pianos and organs exclusively. The witness also said that before putting the ivory pieces on the keys the ivory is scraped, to make the glue hold them to the wood. He said he had seen the corners of the ivory pieces rounded off (Rec., p. 8).

The defendant's counsel moved the court to direct a verdict for the defendant—

1. Because the imported article was not a musical instrument; and

2. Because it was not a completed indispensable part of a musical instrument.

This motion being denied, the defendant, by his counsel, excepted (Rec., p. 8).

The judge then charged the jury that if they thought the ivory pieces were used exclusively for musical instruments, *i. e.*, pianos and organs, the plaintiff was entitled to recover, otherwise that they should find for the defendant (Rec., p. 9).

The defendant excepted to the charge in the

particulars in which it was incompatible with the two grounds on which he had asked the court to instruct the jury to find for him (Rec., p. 8).

The jury returned a verdict for the plaintiff.

ERRORS ASSIGNED.

The judgment is erroneous in this:

(1) That the court refused to charge the jury that the ivory pieces were not musical instruments; and

(2) That the court refused to charge the jury that the ivory pieces were not a completed indispensable part of a musical instrument.

ARGUMENT.

The court below, as we have seen, held these ivory pieces dutiable as "*musical instruments*" in part under the tariff of 1874 and in part under the tariff of 1883.

The act of 1874 lays a duty of 30 per cent. ad valorem on "*musical instruments of all kinds*," and the act of 1883 lays a duty of 25 per cent. ad valorem on "*musical instruments of all kinds*."

The origin of the view that Congress, by the

words "musical instruments of all kinds," meant to include the parts of such instruments when imported separately and not in a combined whole, seems to have been a ruling of Judge Shipman in the unreported case of Foote *v.* Arthur, tried probably early in the year 1880.

The district attorney's report of this case to the Secretary of the Treasury shows that the judge told the jury that any part of a musical instrument, provided it was *complete* and *indispensable*, was dutiable as a musical instrument.

The substance of this ruling is also given in Treasury Synopsis No. 4453, dated March 13, 1880, being a letter addressed to the collector at New York. It is also there stated that "the matter having been referred to the United States Attorney-General under the requirements of section 1 of the act of March 3, 1875 (18 Stat., 469), that officer has advised, under date of the 5th instant, that the decision be acquiesced in by the Government."

The reason of this somewhat strained interpretation of the plain words of the law is, perhaps, to be found in a sort of brief on the subject made

by an experienced officer of the customs division, which I find on the Treasury files, and which says the ruling of Judge Shipman in *Foote* v. *Arthur* should be acquiesced in, *because it seemed inequitable that a higher rate of duty should be assessed on a part of a musical instrument than on the instrument itself.* In that case it *happened* that there was a greater *rate* of duty on the part than on the whole. It is not said, however, on which side the equity would have been if the parts had been dutiable at less rates than the combined whole.

Perhaps this is the only reason that can be given for the rulings in that case, and it was perhaps the reason given in S. S. 2415, August 28, 1875, where it is said that, musical strings being essential parts of musical instruments, "*they should pay no higher duty than the instruments finished.*"

On March 30, 1877 (S. S. 3176), Secretary Sherman instructed the collector at New York that there was "no special provision of law for parts of musical instruments," and therefore that strings for musical instruments, composed

of metal and gut, which have metal as chief value, should be classified under Schedule E, as manufactures of which metal is a component material of chief value."

On June 22, 1877, the Department held that "violin bows" were "in no sense musical instruments, but only parts of musical instruments, for which there is no special provision in the tariff." (S. S. 3274; see also S. S. 2925, August 17, 1876.)

Can the ruling, that an essential part of a musical instrument is dutiable at the same rate as the instrument in a completed state, be supported under the tariffs of 1874 and 1884, both of which lay the same rate of duty on "carriages *and parts of carriages*," on "*chronometers and parts thereof*," and on "*clocks and parts of clocks*."

If Congress had intended to prevent what is called the *inequitable* result of leaving a part of a musical instrument possibly dutiable at a higher rate than the whole thing, it is fair to presume they would have assessed a duty on musical in-

struments *and parts thereof* as in the other cases mentioned.

But, again, it has been held since *Foote* v. *Arthur* that a part of a musical instrument, to be dutiable as the whole, must, first, be *indispensable*, and, secondly, *completed.*

This settled rule the trial judge disregarded, for it was clearly in evidence, by the plaintiff's own witness, that the imported ivory pieces needed to be *roughened* on the under side to make the glue hold them the better to the wooden keys.

It is submitted that the judgment should be be reversed.

WM. A. MAURY,
Assistant Attorney-General.

Supreme Court of the United States.

WILLIAM H. ROBERTSON, Collector of the Port of New York, Plaintiff in Error,

AGAINST

OTTO GERDAU.

October Term, 1889.
No. 56.

The defendant in error imported at the port of New York in the years 1882 and 1884 certain pieces of ivory for the keys of pianos or organs. They came in packages and matched to certain octaves for certain instruments, to wit: Five octaves for organs and seven octaves for pianos. They were sawed and cut in a particular shape for that purpose, tapering in thickness so that the ends would meet and the shaft come in between. They are used for no other purpose than piano and organ keys, and are glued on the keys. The importations of 1882 are subject to the provisions of the Revised Statutes, and those of 1884 to the Tariff Act of March 3, 1883.

The Collector, the plaintiff in error, assessed a duty of 35 per cent. and of 30 per cent. *ad valorem* upon the goods in question as manufactures of ivory under Schedule M. of the Revised Statutes, and Schedule N. of the Tariff Act of March 3, 1883, which the importer paid under protest, claiming them to be dutiable at 30 per cent. and 25 per cent. *ad valorem* under the same acts as ~~medical~~ instruments.

Counsel for the plaintiff in error asked the Court to

direct a verdict on the following grounds: 1st, that the imported article was not a musical instrument; 2d, that it was not a completed indispensable part of a musical instrument; which the Court denied, and submitted to the jury the question whether the imported articles were used exclusively for musical instruments.

The evidence being closed, counsel for the plaintiff in error asked the Court to charge that, in order to find for the plaintiff, they must find that the imported articles are completed indispensable parts of a musical instrument.

THE COURT: I will leave out the word "completed;" I put it in just that way, that is, they must be used exclusively for that use and for no other purpose.

To which counsel for defendant excepted.

THE COURT: If they are made on purpose for pianos and organs as musical instruments, and no other purpose, then you may return a verdict for the plaintiff; if they are for any other purpose, return a verdict for the defendant.

Counsel for the defendant then excepted to that portion of the charge of the Court stated as follows:

"If they are made on purpose for pianos and organs as musical instruments and no other purpose, then you may return a verdict for the plaintiff."

The jury returned a verdict for the original plaintiff, the defendant in error here.

POINTS.

I.

The contrasting provisions are "manufactures of ivory" and "musical instruments of all kinds."

In Schedule E of the Act of 1846 (9th Stats. at L., p. 47, middle) we find the same enumeration of "mu-

sical instruments of all kinds" and "manufactures of ivory."

Prior to 1857 the Treasury Department in respect to this enumeration had decided as follows:

"Musical Instruments. Parts thereof, or articles appertaining thereto, and which cannot be used for any other purpose, such as bows, tail-pieces, bridges, pegs or screws for violins, or mouth-pieces or keys for wind instruments, and all other articles or parts necessary to render the instrument complete and fit for use, provided they are not otherwise specified in the tariff, come within the provision in Schedule E of the tariff admitting at a duty of 20 per cent. musical instruments of all kinds and strings for the same, although the date of importation of such articles, or parts, may be distinct from that of the body or frame of the instrument."

In the General Regulations of February 1, 1857, at page 575, it announced this construction to all revenue officers and to every one interested, and the action of the Department from that time until quite recently has in the main been in accord therewith.

Under the Revised Statutes in force prior to 1883, the Department modified its previous rulings, but an action was brought to trial upon protest against such change, resulting in favor of the plaintiff, and in view of that decision the Secretary of the Treasury on the 13th of March, 1880, issued the following instructions to collectors of customs:

"SIR—It has been heretofore held by the Department that separate parts of musical instruments, such as violin bows, bridges, tail-pieces, finger-boards, guitar heads, portions of musical boxes, violin and guitar strings, &c., were not dutiable at the rate of 30 per cent. *ad valorem*, under the provision in Schedule M for 'musical instruments of all kinds,' but were dutiable under the provisions respectively for the materials of which they were composed. The suit (N. S. 5249) of Foote vs. Arthur, which involved the questions as to the rate of duty on such goods, was lately tried at your port and resulted in favor of the plaintiff, the effect of

the decision being to hold that all the articles mentioned were dutiable at the rate of 30 per cent. *ad valorem*, under the provision for 'musical instruments of all kinds,' the Court ruling, as to the proper interpretations to be placed on such provision, that it must be construed to include 'an implement or structure artificially constructed and ordinarily used for the production of a succession of musical and harmonious sounds, or the complete indispensable parts of such structure or implements, artificially constructed, which are practically indispensable in the art of music, and which are constructed and ordinarily used for the production of musical and harmonious sounds.'

The matter having been referred to the United States Attorney-General, under the requirements of Section 1 of the Act of March 3, 1875, that officer has advised, under the date of the 5th inst., that the decision be acquiesced in by the Government.

You are informed that the Department accepts such decision of the Court as conclusive upon the questions as to the classification of the said parts of musical instruments, and you are therefore directed to cause the practice at your port, on future importations of such merchandise, to conform thereto." Synoptical Series Treasury Decisions No. 4453, Vol. of 1880, p. 77.

With full knowledge of the construction placed by the Department of the Treasury and by the Courts, and adjudged by the Attorney-General to be correct, Congress in 1883 repeated the language of the Revised Statutes, which in turn was the language of prior Acts from 1846 to 1874. These acts will be found as follows:

Act of 1846, 9 Stats. at L. 47.

Act of 1861, 12 Stats. at L. 190.

Act of 1862, 12 Stats. at L. 550.

Revised Statutes (Schedule M.), 478.

Act of 1883, 22 Stats. at L. 513.

In all of these acts also similar provisions to those under which the Collector claims the importations to be dutiable, are also found, viz.:

"Manufactures of bone, shell, horn, pearl, ivory or

vegetable ivory" (Act 1846, Schedule C, 9 Stats. at L., 45).

"Manufactures of bone, shell, horn, ivory or vegetable ivory" (Act of 1861, 12 Stats. at Large, 192. Act of 1862, 12 Stats. at L., 557).

"Manufactures of bones, horn, ivory or vegetable ivory" (Revised Statutes, Schedule M., page 474).

"Bone, horn, ivory or vegetable ivory, all manufactures of, not specially enumerated or provided for in this act" (Act of 1883, 22 Stats. at L., 513, Schedule N).

There is no change whatever in the provisions for musical instruments until 1883, and as to the importation in 1883, under that act the question is whether the words "not specially enumerated or provided for" added in the Act of 1883, takes these articles out of the category of musical instruments and gives them an independent character of their own, the Treasury department having held for twenty-five years that the phraseology "manufactures of ivory" could not do this, and it being in evidence here that these pieces of ivory are made and used solely for the keys of pianos and organs, and the jury having found that they are an indispensable part of a musical instrument of this kind without which it could not be what is commonly known as a piano or organ.

It is also to be noted that the Act of 1883 in the ivory provision also contains the words "not specially enumerated or provided for in this act," which words were not in the prior acts in similar connection.

Such being the history of the legislation of Congress and the construction given in practical administration, and where varied from reversed by the Court, and the evil, if evil it was, not corrected by Congress when

again legislating on the subject, we submit the importations in question, essential parts of a musical instrument, must now be held dutiable as a musical instrument.

Mr. Justice FIELD, announcing the judgment of this Court, says:

"This construction of the department has been followed for many years without any attempt of Congress to change it, and without any attempt, as far as we are advised, of any other department of the Government to question its correctness, except in the present instance. The regulation of a department of the Government is not, of course, to control the construction of an act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

Robertson vs. Downing, 127 U. S., 607, 613.

See further upon this point Hahn vs. United States, 107 U. S., 402, 406, in which the Court refer with approval to United States vs. Pugh, 99 U. S., 265, quoting:

"In the case of a doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect (Edward's Lessee vs. Derby, 12 Wheat., 210), and where this Court refused to interfere with such construction after it had been acted upon for a long time."

See also Edwards vs. Darby, 12 Wheat., 206.
United States vs. State Bank of North Carolina, 6 Pet., 29.
United States vs. McDaniel, 7 Pet., 1.
Surgett vs. Lapice, 8 How., 48.
Smythe vs. Fiske, 23 Wall., 374.
United States vs. Moore, 95 U. S., 760.
United States vs. Pugh, 99 U. S., 265.

Swift Co. vs. United States, 105 U. S., 691, 695.
United States vs. Hill, 120 U. S., 169, 182.
United States vs. Philbrick, 120 U. S., 52, 59.
Brown vs. United States, 113 U. S., 568, 571.
See also Burge vs. Smith, 27 N. H., 332.

II.

The construction of the statute contended for by the importer is the correct one.

It is the reasonable and proper construction to be given in a case like the present, where there can be no doubt the goods were the keys of pianos and organs and fitted for no other purpose.

Suppose all the parts of a piano were imported together but not put together. Is it any less a musical instrument?

III.

The charge of the Judge was in accordance with these views and the judgment should be affirmed.

STEPHEN G. CLARKE,
Of Counsel for Defendant in Error.